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CHAS. E. COOPER

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 470

AMERICAN POWER & LIGHT COMPANY,

Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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September 15, 1944.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

American Power & Light Company prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the First Circuit to review the decree of that Court entered in the above-entitled cause on June 19, 1944, affirming an order of the Securities and Exchange Commission (hereinafter referred to as the Commission), dated December 28, 1943, and an order of that Commission denying Petitioner's Application for Rehearing, dated January 12, 1944.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. §79x(a)) and Section 240(a) of the Judicial Code, as amended (28 U. S. C. §347(a)).

The Opinions Below.

The opinion of the Circuit Court of Appeals for the First Circuit was rendered on June 19, 1944, and is reported at 143 Fed. 2d 250.

The opinion of the Commission rendered December 28, 1943, the order of the same date, and the order denying the Petitioner's Application for Rehearing dated January 12, 1944, have not yet been officially reported. The order of the Commission which forms the basis of this Petition is attached as Appendix A to the Brief annexed hereto.

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. §79), hereinafter referred to as the "Act". The portion of that Act which is directly involved is Section 24(a) thereof (15 U. S. C. §79x(a)), which reads in part as follows:

"Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . ."

Summary Statement.

The Petitioner, a corporation organized under the laws of the State of Maine, registered as a holding company under the Act in 1938.

The Petitioner owns practically all the common stocks and some other securities of 15 corporations which are operating electric (and, in a few instances, gas) public utilities. The Petitioner owns all the common stock of Florida Power & Light Company (hereinafter referred to as "Florida").

Florida is an operating electric and gas utility conducting its business solely in the State of Florida. Florida's capital structure (after full compliance with the order of the Commission, except the two paragraphs therein which are involved in this case and which are declared by the order to be separable from the remainder thereof) consists of \$99,000,000 of assets and \$65,000,000 of debt and the common stock owned by the Petitioner.

The Commission by its initial order of July 10, 1941, made Petitioner (also sometimes referred to as "American") a party to those proceedings, along with its subsidiary, Florida, and Electric Bond and Share Company. This initial order of the Commission raised issues which included "the necessity for stopping dividends on preferred and common stocks held by American * * *".

On August 8, 1941, after the Commission instituted the proceedings against American and the other two companies, American and the other two companies filed a motion with the Commission in which they proposed a financial reorganization program for Florida, which involved substantial voluntary capital contributions by American to Florida and a refinancing of the bonds and the retirement of the preferred stock of Florida. Later American and Florida filed formal applications in connection with that program.

The Commission consolidated the proceedings instituted by it with proceedings based on the reorganization

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program proposed by American and Florida. The Commission made both American and Florida parties to the consolidated proceedings.

Throughout the proceedings, American participated actively through witnesses and counsel, and presented evidence in its behalf. At the hearings in those proceedings and in briefs, American offered contentions which the Commission rejected.

The order of December 28, 1943, in paragraphs separate from the remainder of the order, directed Florida (paragraph 2 of the order annexed hereto as Appendix A herein), first, to take out of its surplus the sum of \$1,815,655. It directed Florida to do this (paragraph 3 of the order) by retaining out of earned surplus 1/12 of that sum in each month of 1944. Secondly, it directed Florida to appropriate annually out of surplus (paragraph 4 of the order) the sum of \$700,000, until approximately \$10,000,000 had been so appropriated.

Petitioner sought review by the Circuit Court of Appeals for the First Circuit of paragraphs 2 and 4 of the order of the Commission (Appendix A) which was issued in proceedings instituted by the Commission.

American, as a result of the reorganization which involved substantial voluntary capital contributions by it to Florida, became the sole stockholder of Florida, and properly expected that any order which had the effect of depriving it of dividends on its stock would be subject to judicial review upon petition by it. American, by the order in question, as the sole stockholder, is now deprived of any distribution by way of dividends of the surplus of Florida to the extent of approximately \$12,000,000.

The order states specifically that compliance with the order so restricting surplus and requiring the appropria-

tion from surplus of \$700,000 per year was to be without prejudice to respondents' right to contest these two paragraphs of the order. (See paragraphs 3 and 4 of the Order, Appendix A). The order, as so written refers to review on behalf of both respondents, namely, American and Florida. The purpose was to permit consummation of the reorganization program without precluding review of the paragraphs specified.

After American filed its petition in the Circuit Court of Appeals for the First Circuit, Florida filed its Petition for Review of these orders by the United States Circuit Court of Appeals for the Fifth Circuit.

On June 19, 1944, the Circuit Court of Appeals for the First Circuit issued its opinion directing that Petitioner's Petition for Review be dismissed upon the ground that the Petitioner, in effect, was not a "person or party aggrieved" within the meaning of Section 24(a) of the Act.

The Question Presented.

Is Petitioner a person or party aggrieved by paragraphs numbered 2 and 4 of the order of the Commission dated December 28, 1943, within the meaning of Section 24(a) of the Act and so entitled to independent judicial review thereof?

Specification of Error to be Urged.

The Circuit Court of Appeals for the First Circuit erred in holding that the Petitioner was not a person or party aggrieved within the meaning of Section 24(a) of the Act and that, therefore, it was not entitled to a judicial review of paragraphs numbered 2 and 4 of the said order of the Commission.

Reasons Relied on for Grant of Writ.

(1) Whether a stockholder affected directly and adversely by an order of the Commission, under the Act here involved, which grants the right to seek review to "any person or party aggrieved", or by orders entered by Commissions under other statutes containing similar language with regard to review, is entitled to review of the order which is directed in the first instance against the stockholder's corporation, is an important Federal question which has not been, but should be, settled by this Court.

(2) The Court below in dismissing American's petition for review on the ground that it was not a "person or party aggrieved" within Section 24(a) of the Act, has decided a Federal question in a way probably in conflict with decisions of this Court under other statutes giving a right to seek review to persons "aggrieved", which decisions should have been held applicable in the present case.

The decision below is in conflict with principles recognized in decisions of other Circuit Courts of Appeals, a prior decision of the Court below and is in conflict with principles followed by this Court in numerous of its decisions.

(3) A real question of deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States is presented in the instant case, as the petitioner by the decision below has been denied judicial review of an administrative order which deprives it of its reasonable expectancy of many millions of dollars.

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WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, your petitioner prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, to the end that the above cause may be certified to and reviewed and determined by this Court and that the judgment of said Circuit Court of Appeals in the above-entitled cause may be reviewed by this Court, and your petitioner prays for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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September 15, 1944.



BRIEF IN SUPPORT OF PETITION.

[For index, table of cases, table of statutes, reference to opinion below, jurisdictional statement, summary statement of the case and specification of error, we refer to the petition.]

While the provisions of the order sought to be reviewed are in the first instance directed to Florida, the injury resulting from carrying out those provisions is suffered by American. The order directs Florida to charge off large amounts of its surplus and thereby make cash equivalent to those sums unavailable for payment as dividends to Florida's stockholder, American. Thus, Florida is ordered to retain large sums of money as against its sole stockholder, which would otherwise be entitled to receive the money as dividends. Yet in this situation the Court below has held (a) that Florida, which is ordered to keep the money in question, is the only one entitled to appeal from these provisions of the order and (b) that American, the stockholder which is being deprived of dividends in the amount which Florida is ordered to retain, has no standing to appeal from the order. The effect of the decision dismissing American's petition for review is to deny a review to the very party which is injured by these provisions of the order.

The inequity of the decision below denying American the right to seek review of the order is emphasized by the fact that American was made a party to the proceeding by the Commission at the very inception of the proceeding, that it actively participated therein throughout, and that the provisions of the order which are sought to be reviewed specifically recite that dispositions made therein are without prejudice to respondents' right to contest the order.

After having thus been made a party by the Commission to the proceeding and having been heard by the Commission which thereupon overruled its contentions, American now has been held not to be "aggrieved" by the order and to have no sufficient interest to review the order.

In arriving at its decision, the Court below held that the rule applicable to ordinary lawsuits against a corporation, namely, that those lawsuits must be defended, and judgments therein against the corporation appealed from, by the corporation and not by its stockholders, was applicable to review of the order here in question. We submit that in so holding that Court fell into plain error. It gave no effect to the specific language which Congress inserted in Section 24(a) of the Act broadening the right to seek review by granting it to any "person or party aggrieved". Certainly there is no warrant for emasculating that broad language so that it is given no more effect than if the statute contained the restricted right of appeal given in ordinary lawsuits only to the person against whom a judgment is entered. No case was cited by the Court below in its opinion in which a stockholder was denied a right of review from an order against his corporation where the statutory review provision contained the broad language appearing in Section 24(a) of the Act.

Moreover, the Court below failed to give effect to the difference between a situation where a money judgment is entered against a corporation directing the corporation to pay money from its treasury to a third person, and a situation, like the present one, where a company is being directed to *retain* money as against its stockholder. In the first situation there is no possible conflict of interest between the corporation and its stockholder; therefore, the corporation by its appeal fully protects its own interests and the interests of its stockholders. But in the second

situation, which is the present situation, there is an obvious difference between the interests of the corporation and the interests of its stockholder. The corporation ordered to retain the money has no such vital interest in seeing that it is made available for payment to its stockholders as have the stockholders. Also, the corporation may be met on its appeal with the defense that it has suffered no injury since it has been ordered to retain money rather than pay it out.*

We submit that the Circuit Court of Appeals has interpreted Section 24(a) of the Act erroneously and such interpretation should be corrected by this Court to the end that doubt as to the meaning should be removed and the correct meaning be settled by this Court.

This Court has not determined who is "a person or party aggrieved by an order issued by the Commission" within Section 24(a) in any case, or determined whether stockholders whose dividends are restricted by orders of the Commission are to be denied the rights specifically given by Congress in the enactment of the statute "to any person or party aggrieved".

The case, therefore, presents one aspect of a question of great importance in the conduct and management of public utility operating and holding companies, namely, whether an order of the Commission directing or controlling the use of the net income of an operating company,

* In fact, that very question was raised in this Court recently on the oral argument of *Northwestern Electric Co. v. Federal Power Commission*, 321 U.S. 119 (1944). As appears from the stenographic transcript of the argument, a Justice of this Court inquired how Northwestern Electric Co. (which is another subsidiary of American) could complain that a Federal Power Commission order deprived it of property when the effect of the order was to order Northwestern to retain certain amounts instead of paying them out in dividends to American. That point was met by informing the Court that American was a petitioner for review as well as Northwestern. But by the order below in the present case American is being deprived of the right similarly to protect its interests in the present case.

the effect of which order is direct and damaging to the stockholder, may not be reviewed by the stockholder in its own right. The damage sustained by American is peculiar to it, and is suffered by no other security holder or any other party. This question is of extreme importance to every public utility holding company for, if the interpretation of the Circuit Court of Appeals is correct, a stockholder in its own right, sustaining damage peculiar to it, is denied the review of an order which might prevent the payment of dividends on its stock for what must be an extended, and may be an indefinite, period of time.

In its opinion, the Circuit Court of Appeals stated that the phrase "any person or party aggrieved" is not one of exact meaning" and from that premise concluded that if Congress had intended to confer upon a stockholder an independent right to seek a review of an administrative order directed against the corporation (which right the Court concludes is a departure from the ordinary principles of corporate law), Congress would have expressed such intention in explicit language. On its face this conclusion seems to do violence to the exact language used by Congress, viz: "any person or party aggrieved".

The Circuit Court of Appeals has applied a rule of law in construing Section 24(a) of the Public Utility Holding Company Act in a way which probably conflicts with applicable decisions of this Court.

Northwestern Electric Co. v. Federal Power Commission, 321 U. S. 119 (1944), has already been mentioned above. As in this case, so in *Northwestern*, an order had been directed by the Federal Power Commission against an operating utility, all of whose common stock is owned by American Power & Light Company, Petitioner here. American joined with Northwestern in an application for a review by this Court of that order. The application was

granted and argument later had thereon on behalf of both petitioners. The decision of this Court in that case commences with the words "petitioners" and the Court considered the position of American Power & Light Company as a stockholder.

The decision of the Circuit Court of Appeals likewise runs counter to the decision of this Court in *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470 (1940). In the *Sanders* case, *supra*, this Court permitted a radio broadcasting licensee to review the action of the Commission in granting a permit for the erection of a rival station on the basis that an economic injury was suffered by the licensee to the extent that he became "a person aggrieved or whose interests are adversely affected" by the decision of the Commission within the meaning of Section 402(b)(2) of the Communications Act of 1934, 48 Stat. 1064, 1093. Thus this Court effectuated the purposes of the particular statute.

Another decision of this Court with which the decision below conflicts is *Federal Communications Commission v. National Broadcasting Co.*, 319 U. S. 239, where this Court said at page 248:

"It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing."

The Act before this Court was the Federal Communications Act, Section 402(b)(2), which permits an appeal by any "person aggrieved or whose interests are adversely affected." In the present case, American was made a party by the Commission to the proceeding, was heard throughout and *a fortiori* is entitled to seek review of the order entered after the hearing.

Another decision of this Court with which the decisions below conflicts is *Interstate Commerce Commission v.*

Washington-Oregon Railroad & Navigation Co., 288 U. S. 14 (1933). In that case it was held that persons who had been permitted to intervene in the proceedings below were entitled to appeal under the provision there involved giving "aggrieved parties" the right to appeal notwithstanding that the original party (the United States) refused to appeal. While three Justices dissented in that case, the decision was unanimous on the right to appeal since the majority decided against the appellants on the merits and the minority were of the view that there should have been a decision on the merits in favor of the appellants.

In disregard of Section 24(a) of the Act and in disregard of the difference in position of Florida and American, the Court below based its decision on the fact that Florida could and did file a Petition for Review of the identical order of the Commission. It is totally irrelevant that Florida, the operating company, could or did file a petition to review the order of the Commission. The impact of the order for every practical purpose is directly upon American. Whether Florida did or did not pay dividends might be unimportant to Florida but failure of American to receive presently its just return on its substantial investment by way of dividends available from current earnings for that purpose, because the earnings are diverted to another purpose by force of the Commission's order, does irreparable damage to American. Not only is American a person or party aggrieved; it was considered by the Commission to be a necessary party to these proceedings before the Commission. The possibility that, insofar as the paragraphs of the Commission's order sought to be reviewed are concerned, the proceeding could have been instituted by the Commission against Florida alone, does not alter or destroy American's standing as a party aggrieved so that American must proceed only through Florida in order to obtain the review of the Commission's order.

In addition to the cases above mentioned the Circuit Court of Appeals likewise differs from the decisions reached by Circuit Courts of Appeals of other Circuits, namely, i.e. *Associated Industries Inc. v. Ickes*, 134 F. 2d 694 (C. C. A., 2nd); *Todd v. Securities and Exchange Commission*, 137 F. 2d 475 (C. C. A., 6th) and *Okin v. Securities and Exchange Commission*, 137 F. 2d 398 (C. C. A., 2nd).

The confusion surrounding the question is further intensified by two decisions of the Circuit Court of Appeals for the Second Circuit, handed down subsequent to the decision of the Court below, in cases entitled *Okin v. Securities and Exchange Commission* (July 10, 1944), not yet reported. In both cases the petitioner was the owner of 9,000 shares out of a total of 5,250,000 shares of common stock of Electric Bond and Share Company. In the first case, the petitioner sought review of the entire order, parts of which are here involved, and which was directed to Florida Power & Light Company and American. Electric Bond and Share Company is a minority stockholder of American owning about 31% of its common stock. In the first case, the petitioner, who was not a party to the administrative proceedings, was said not to suffer any damage peculiar to himself or different in kind from damages sustained by all common stockholders of Electric Bond and Share Company and was, therefore, not a party aggrieved. The order of the Commission there in question was not directed either to the petitioning stockholder or to Electric Bond and Share Company. On the same day, July 10, 1944 in the second case, the Second Circuit Court of Appeals held that the same petitioning stockholder was entitled to judicial review of an order of the Commission authorizing a financial transaction between Electric Bond and Share Company and its subsidiary, American & Foreign Power Company.

Moreover, by its decision in this case the Circuit Court below in substance and fact reversed its prior determination in *Lawless v. Securities and Exchange Commission*, 105 F. 2d 579. In the opinion of the Court below, it is now said that, "in so far as the language of the Lawless opinion may intimate that the petitioner was a person aggrieved merely by virtue of the fact that he had been admitted to participation in the proceedings before the Commission we do not think that it is correct". We submit that an opinion of this Court, construing for the first time the provisions of Section 24(a) of the Act, is requisite to remove the confusion evidenced by these decisions.

The Circuit Court of Appeals in attempting to apply inapplicable rules of common law relating to the so called "derivative actions" of stockholders on behalf of corporations, demands of the Petitioner full submission to a test not contemplated by Congress when it enacted Section 24(a) of the Public Utility Holding Company Act.

The Circuit Court of Appeals, by dismissing the petition for review for alleged lack of jurisdiction, has deprived this petitioner of its right to judicial review provided for by Section 24(a) of the Act and guaranteed by the due process clause of Article Fifth of the Amendments to the Constitution of the United States.

The denial of judicial review for lack of jurisdiction is a denial of due process of law in violation of the Fifth Amendment to the Federal Constitution. American, a party to these proceedings before the Commission, is having its property taken without just compensation and is being deprived of its property without due process of law. American is the owner of all the outstanding common stock of Florida and is entitled by way of dividends on said common stock to so much of the net income of Florida as its directors may think feasible to distribute consistently with its

cash resources and cash requirements. Under the order of the Commission, however, American must forego dividends on Florida's common stock in an amount equivalent to the charges of more than \$12,000,000 which Florida must make against surplus. Of this amount, \$1,800,000 must be charged in 1944 and there must be an appropriation of \$706,000 annually to a contingency reserve until a total of approximately \$10,500,000 is accumulated. The gravity of the effect of this order on American's investment in Florida is patent. American has made voluntary contributions amounting to millions of dollars to Florida and is entitled to protection of the remainder of its investment in Florida from the adverse effect of the order of this Commission.

That such a taking of property as the Commission's order contemplates is condemned by the Fifth Amendment, has been made abundantly clear by decisions of this Court. Although Congress, as an incident of the exercise of its commerce powers, may impair contract rights to the extent they are executory, it may not confiscate property founded on contract rights vested at the time of the passage of an act purporting to grant such power, either for the benefit of the public or for one individual or group at the expense of another. For example, in *Lynch v. United States*, 292 U. S. 571, Mr. Justice Brandeis, speaking for the Court, said, at page 579:

"Second. The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States v. Central Pacific R. Co.*, 118 U. S. 235, 238; *United States v. Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67."

Again, in the case of *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, construing the so-called Frazier-Lemke Act of June 28, 1934, it was held, also in an opinion by Mr. Justice Brandeis, that, although that Act was adopted pursuant to the broad bankruptcy powers granted to Congress under the Constitution, the power therein granted must be exercised subject to the restrictions of the Fifth Amendment and that Congress may not take for the benefit of the debtor or the public rights in specific property acquired by the creditor prior to the date of the Act.

In the *Northwestern* case, the opinion of the Circuit Court of Appeals, 134 Fed. 2d 740, does make this observation as to American's normal right to dividends on stock of the operating company (p. 744):

"While it might be said that American is not entitled to the earnings until declared as dividends, and therefore nothing has been taken from it, that view disregards realities. *It is certainly possible, if not probable, that the market value of the stock would decrease, probably substantially, if no dividends can be paid thereon for ten years or more.*"
(Citing *Kansas City So. Ry. v. United States*, 231 U. S. 423, 455.) (Italics supplied.)

Disavowal by the Commission, both in its brief and upon the argument before the Court below, that the motion to dismiss was a procedural step to render unavailable or weaken contentions which American, rather than Florida, should make is futile when viewed in the light of the effect of the order dismissing American's petition. Whether the Commission intends to foreclose the contention available to American is of no moment so long as the effect of the order may be that very thing. Failure of the Commission to raise any objection to Florida's making the contention that American is being improperly deprived of its prop-

erty without due process of law because of its being deprived of dividends from Florida's surplus is without significance, if the Appellate Court itself brings up the question, as was done in the oral argument in this Court in the *Northwestern Electric Company* case already referred to.

Nor is the possibility that numerous petitions to review might be filed by stockholders a valid ground for denying this petitioner its independent right of review. In *Associated Industries v. Ickes*, 134 F. 2d 694, it was contended that to allow consumers to appeal would open up the "possibilities of separate law suits by hundreds of thousands of individual consumers." In that case it was pointed out that there are only eleven circuits where such petitions could be so filed and the filing of the transcript in any one of the eleven Circuit Courts gives that Court exclusive jurisdiction of any and all appeals from the particular order, so that upon application duly made, all other appeals would be transferred to and consolidated in the Court having jurisdiction and there would be only one consolidated appeal in one Court.

By its decision, the Court below holds that to permit "a person or party aggrieved" to obtain a review of an order of the Commission such "person or party aggrieved" must meet the qualifications prescribed for one's "standing to sue" in the Federal Courts.* In reasoning

* This is directly contrary to the decisions of this Court, which, as stated in *Associated Industries v. Ickes*, 134 Fed. (2d) 694 at 702 (C. C. A. 2, 1943), hold that under a statutory provision giving a "person aggrieved" the right to seek review, that person, in order to obtain review, need not have the "standing" required to bring an ordinary lawsuit. The *Associated Industries* case contains an exhaustive discussion of the right of review granted by such a statutory provision and points out how much broader the right of appeal is in such cases than it is in ordinary lawsuits.

to this conclusion the Court below relies almost solely on the decision of this Court in *Pittsburgh & West Virginia Ry Co. v. United States*, 281 U. S. 479 (1930). But that decision does not support the principle. The *Pittsburgh & West Virginia* case, *supra*, was a law suit, not an administrative proceeding. This is obvious from a reading of the opinion. Speaking for the Court, Judge Brandeis (p. 487) stated:

“* * * Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order.”

The order sought to be reviewed by the petitioner herein is akin to an order of reorganization and most affirmatively does “deal with the interest of investors”. But more important, the order sought to be reviewed in *Pittsburgh & West Virginia Ry. Co.*, *supra*, was under the Urgent Deficiencies Act which did not allow, as does Section 24(a) of the Public Utility Holding Company Act, “any person or party aggrieved” to seek a review of the administrative order. In the *Pittsburgh* case the standing of the parties seeking review had to be decided upon general principles. Congress, in enacting the Public Utility Holding Company Act, sought to promote the public interest and the interest of investors or consumers and, to make certain that those affected by the provisions of the Act might be heard and have their day in Court, specifically provided that “any person or party aggrieved” by an order issued by the Com-

mission might, as an independent right, have the same reviewed by an appropriate court.

Congress in the Act here involved has employed specific language which gives to "any person or party aggrieved" an independent right of review no matter what its status, whether a corporation, stockholder, creditor, consumer or otherwise. The right to review given to the stockholder, American, by Section 24(a) of the Public Utility Holding Company Act, is an independent right and attaches to the stockholder by reason of the Act and is not derivative through its corporation.

That American is a "person aggrieved" is emphatically obvious. Does American gain or lose as a result of the impact of the order sought to be reviewed? The answer is that it stands to sustain substantial loss. Its right to be heard, particularly given by Congress, is withdrawn by judicial decree erroneously entered.

Conclusion.

It is respectfully submitted that the foregoing petition for writ of certiorari should be granted.

Respectfully submitted,

A. J. G. PRIEST,
R. A. HENDERSON,
JAMES S. REGAN,
Counsel for Petitioner.

September 15, 1944.

APPENDIX A.

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
At a regular session of the Securities and Exchange
Commission, held at its office in the City of
Philadelphia, Pennsylvania, on the 28th
day of December, A. D., 1943.

IN THE MATTER

of

FLORIDA POWER & LIGHT COMPANY
AMERICAN POWER & LIGHT COMPANY
ELECTRIC POWER & LIGHT COMPANY
File No. 59-26
FLORIDA POWER & LIGHT COMPANY
AMERICAN POWER & LIGHT COMPANY
File No. 70-403
(Public Utility Holding Company Act
of 1935)

Order.

The Commission having instituted proceedings under Sections 11 (b) (2), 12 (b), 12 (c), 12 (f) and 15 (f) of the Public Utility Holding Company Act of 1935 directed to Florida Power & Light Company, an electric and gas utility, its corporate parent, American Power & Light Company, a registered holding company, and Electric Bond and Share Company, also a registered holding company, raising issues therein as to: the existence of substantial write-ups in the plant account; the adequacy of the reserve for retire-

ments and depreciation; the necessity for stopping dividends on preferred and common stocks held by American, and interest on the debentures owned by American; the existence of an unfair and inequitable distribution of voting power among its various classes of security holders, the steps necessary to cure such inequities, if found to exist, including subordination to publicly-held securities of American Power & Light Company's holdings of Florida Power & Light Company's preferred stock and debentures; and the treatment to be afforded certain sums received by American Power & Light Company from Florida Power & Light Company on or about July 1, 1941 as dividends on preferred stock; and

Florida Power & Light Company and American Power & Light Company having filed joint applications and declarations with amendments thereto under Sections 6, 7, 9, 10 and 12 of said Act relating to: the issuance and sale by Florida Power & Light Company to the public of \$45,000,000 principal amount of first mortgage bonds and \$10,000,000 principal amount of sinking fund debentures pursuant to the competitive bidding requirements of Rule U-50 under the said Act; the issuance and sale of \$5,000,000 principal amount of serial notes to certain banks and institutions; the issuance of \$5,000,000 principal amount of sinking fund debentures to American Power & Light Company in exchange for \$5,000,000 debentures presently held by that company; the surrender by American Power & Light Company to Florida Power & Light Company, as a capital contribution to the latter company, of \$17,000,000 principal amount of the debentures, 13,477 shares of the \$7 preferred stock, 10,000 shares of the \$6 preferred stock, and 20,000 shares of the second preferred stock of the latter company; and the transfer by American Power & Light Company, as a capital contribution to Florida Power & Light Company, of the notes, open account indebtedness, and capital stock of Utilities Land Company (a wholly-owned subsidiary of American Power & Light Company); and these proceedings by Order having been consolidated with the aforesaid proceedings instituted by the Commission; and

Samuel Okin having filed a request for leave to intervene in the above consolidated proceedings and having requested oral argument and permission to file a brief therein, and having been granted limited participation by the trial examiner; and

Public hearings having been held after appropriate notice and the Commission having considered the record and having made and filed its Findings and Opinion herein;

(1) IT IS HEREBY ORDERED pursuant to Sections 15(f) and 20(a) of the Public Utility Holding Company Act of 1935 that Florida Power & Light Company shall make upon its books of account the following adjustments:

(a) Florida shall, by appropriation, from earned surplus (including earned surplus made available by transfer from insurance reserve), increase its reserve for property retirements in the amount of \$2,400,000 as proposed by Florida:

(b) Florida shall, by charge to earned surplus, eliminate from its plant account the known system write-up therein in the amount of \$27,615,043.91;

(c) Florida shall, by charge to earned surplus, eliminate from its plant account interest on excess capacity capitalized therein in the amount of \$1,888,067.20;

(d) Florida shall, by charge to earned surplus, eliminate from its plant account capital stock expense capitalized therein in the amount of \$114,728.00;

(2) IT IS FURTHER ORDERED that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned surplus not later than December 31, 1944, an amount of \$1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees;

(3) IT IS FURTHER ORDERED that Florida Power & Light Company, as a provision for the disposition of the capital-

ized intra-system profits ordered in paragraph (2) above to be classified in Account 107 and eliminated from the plant account by charging to earned surplus, shall each month during the calendar year 1944 retain out of, and shall restrict, earned surplus in an amount of not less than one-twelfth (1/12) of \$1,815,655 until such time as a total of \$1,815,655 shall have been retained and restricted and shall indicate by appropriate footnotes to all published financial statements that its earned surplus is subject to that restriction; compliance with such order so restricting surplus to be without prejudice to respondents' right to contest the classification of said \$1,815,655 in Account 107 and the elimination of such item;

(4) IT IS FURTHER ORDERED that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surplus to a contingency reserve at least \$700,000, such act of appropriation to be without prejudice, however, to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued;

(5) IT IS FURTHER ORDERED that the provisions of paragraphs (2), (3) and (4) above shall be deemed severable from the remaining portions of this order and shall not be deemed conditions to the granting of the applications and the effectiveness of the declarations with respect to the transactions proposed by applicants-declarants which are approved in paragraph (6) hereof;

(6) IT IS FURTHER ORDERED that said applications, as amended, be, and hereby are, granted, and said declarations, as amended, subject to Commission approval by further order of the terms of the bond and debenture financing which shall be determined by competitive bidding, and subject to Commission approval by further order of the terms of the serial note issue to be supplied by amend-

ment, be and hereby are, permitted to become effective forthwith, all subject to the terms and conditions contained in Rule U-24, and subject to the further condition that prior to or concurrently with the final closing with respect to the sale of the proposed bonds and debentures American Power & Light Company shall have made the proposed capital contributions to Florida Power & Light Company and Florida Power & Light Company shall have made upon its books of account the accounting/adjustments proposed by it and hereinbefore ordered by us to be made in paragraph (1), sub-paragraphs (a), (b), (c) and (d) above.

(7) IT IS FURTHER ORDERED that jurisdiction be, and hereby is, reserved over all fees, commissions, or other remunerations to be paid in connection with the said joint applications and declarations;

(8) IT IS FURTHER ORDERED that the restriction contained in our Order of July 10, 1941, which required American Power & Light Company to retain in a special account the dividends received on or about July 1, 1941 on its holdings of Florida's \$7 and \$6 preferred stock, is hereby terminated; and

(9) IT IS FURTHER ORDERED that the requests of Samuel Okin for leave to intervene, for oral argument, and for permission to file a brief be, and hereby are, denied.

By the Commission.

ORVAL L. DU BOIS,
Secretary.

(SEAL)

